

VIVIENNE GOONEWARDENE  
 v.  
 HECTOR PERERA AND OTHERS

SUPREMECOURT

RATWATTE, J., COLIN - THOME, J., AND SOZA, J.

S.C. APPLICATION NO. 20/83.

MAY 25, 31 1983 AND JUNE 1, 2 AND 3, 1983.

*Section 77 of the Police Ordinance - Permit to conduct a procession — Conduct of a police officer - Section 32(1) (f) of the Code of Criminal Procedure Act 15 of 1979 - Unlawful arrest of a participant in a procession - Violation of a fundamental right - Articles 11 and 13(1) of the Constitution - Onus Probandi in cases of violation of fundamental rights - Was the infringement or alleged infringement executive or administrative action.*

In this application under Section 126 of the Constitution the petitioner alleged that she was subjected to illegal arrest and detention in violation of Article 13(1) of the Constitution and to "cruel, inhuman and degrading treatment" in violation of Article 11 of the Constitution. The petitioner who was the President of the Lanka Sama Samaja Kantha Sainmelanaya together with members of her organization and representatives of certain other organizations staged a demonstration displaying banners and placards opposite the American Embassy emphasizing the need to preserve the Indian Ocean as a zone of peace and protesting against the establishment of a nuclearized military base in the island of Meego Garcia. This demonstration was held on March 8th 1983 which was International Women's Day. The petitioner alleged that her fundamental rights were infringed by the respondent and other officers of the law attached to the Kollupitiya Police Station. The alleged infringement had occurred after the demonstration was concluded, according to the petitioner.

Held

- (1) The standard of proof that is required in cases filed Under Article 126 of the Constitution is proof by a preponderance of probability as in a civil case and not proof beyond reasonable doubt. •
- (2) The allegation of degrading treatment in violation of the petitioner's fundamental rights as guaranteed by Article 11 of the Constitution had not been established by proof to the high degree of probability required upon consideration of the evidence placed before Court.
- (3) Section 77(1) of the Police Ordinance does not make it an offence to take out or hold a procession on a public road in an urban area without a valid permit and contravention of the provisions of Section 77(1) is a non-cognizable offence for which arrest without a warrant is not permissible.
- (4) The Police Ordinance does not require a permit or even permission to hold or take out a procession on a public road and all that is required is that notice either written or oral should be given to the PoUce O.I.C.

In the circumstances the order to the processionists to disperse was illegal and there was no justification for arresting the petitioner without a warrant by invoking the provisions of Section 32(1)(f) of the Code of Criminal Procedure Act No. 15 of 1979. Thus the illegal arrest constituted an infringement of the petitioner's fundamental rights as safeguarded by Article 13(1) of the Constitution.

(5) The remedy prescribed by Article 126 of the Constitution is available only where there is an infringement or imminent infringement of a fundamental right by executive or administrative action and in the instant case, infringement of a fundamental right committed under colour of office by public officers must result in liability being cast on the State.

*Per Soza, J.:* "Public authorities clothed by law with executive and administrative powers are organs of the State. A police officer using the coercive powers vested in him by law acts as an organ of the State. As much as the State is served when he enforces the law, the State is liable for the transgressions of fundamental rights he commits **when** he is enforcing the law,"

Cases referred to:-

*Velmunigu v. The Attorney-General and another* - S.C. Application 74/81-S.C. Minutes of 9.11.81.

*Maharaj v. The Attorney-General of Trinidad and Tobago* (No. 2) — (1979) A.C. 385.

*Thomhill v. The Attorney-General of Trinidad and Tobago* (1980) (2)W.L.R. 510.

*Mariyadasa Raj v. The Attorney-General and another* - S.C. Application 130/82 - S.C. Minutes of 14.2.1983.

*Dr. Colvin R. de Silva with V.S.A :Pullenayagani, R. Weerakoon and Miss S. de Silva for petitioner:*

*H.L. de Silva Senior Attorney-at-Law with V. Ratnasabapathy for 1st respondent.*

*Sunil de Silva, Additional Solicitor-General with S.T. Kumarasiri, State Counsel and A. R. Wickramanayake, State Counsel for 2nd and 3rd respondents.*

MAY, 8, 1983.

**SOZA, J.**

**In** this application the petitioner complains that she was on March 8, 1983 subjected to illegal arrest and detention and cruel, inhuman and degrading treatment in violation of her fundamental

rights by the 1st respondent who is the Officer-in-Charge of the KoUpitiya PoUce Station. She now seeks relief and redress under Article 126 of our Constitution of 1978.

The petitioner is a veteran politician 66 years of age. She has been a Member of Parliament and in 1964 she was a Junior Minister. She is today the President of the Lanka Sama Samaja-Kantha Samrnelanaya — a women's organisation interested and active in local and foreign affairs. March 8, 1983 was International Women's Day. As part of the programme of this day about 8.45 a.m. the petitioner along with members of her organisation and representatives of certain other women's organisations staged a demonstration displaying banners and placards opposite the American Embassy emphasising the need to preserve the Indian Ocean as a peace Zone and protesting against the establishment of a nuclearised military base in the island of Diego Gracia. They also handed over at the Embassy a letter signed by the petitioner and the leaders of two other women's organisations and addressed to President Reagan. Thereafter the demonstrators dispersed. The working women left for their places of work. The remainder along with the petitioner started walking back along the left side of the GaUe Road towards KoUupitiya Junction with the object of going over to the petitioner's house in KoUupitiya. As they passed the KoUupitiya PoUce Station a posse of poUcemen snatched the banners which were being taken along to be stored in the petitioner's house. A short time later the petitioner was informed that the newspaper cameraman who had been walking along with them had been taken to the PoUce Station for taking snaps of the PoUcemen snatching the banners. Thereupon the petitioner along with Mrs Ouida Keuneman and Mrs. Srima WijetiUeke walked into the Police Station to request the cameraman's release. At the Police Station she found Mrs Nanda de Silva already there speaking on behalf of the cameraman. The poUce officers there requested them to await the arrival of the Officer-in-Charge of the PoUce Station. About half an hour later the Officer-in-Ctiarge who is the 1st respondent to this appUcation arrived. The petitioner walked up to him and requested the release of the cameraman. The 1st respondent shouted at her, "Shut up, you are under arrest". She explained that she was not under arrest but had come to the PoUce Station of her own accord to seek the release of the cameraman. Thereafter she attempted to walk out of the room where she was seated to inform those outside not to wait for them. She was then physicaUy stopped by a policeman and almost immediately the 1st respondent held her and threw her on the floor. While she lay fallen the 1st respondent kicked her and put his foot on her leg.

Mrs Ouida Keuneman came to assist her- to get up. She too was attacked by the 1st respondent and her saree was torn. Later the party leaders and several others came but by then the 1st respondent had left the scene, The petitioner and the others were later allowed to leave the PoUce Station. On her insistence her statement and those of her companions were recorded before they left the Police Station. The Police officers gave nO reason for her arrest and detention. Apart from the 1st respondent, the petitioner has named the Inspector-General of PoUce and the Attorney-General as the 2nd and 3rd respondents respectively.

The petitioner filed with her affidavit the annexes marked A to D. After the respondents filed their affidavits and documents the petitioner filed a counter affidavit and the document E. ,On 19.5.1983 she was able to obtain the statement she made to the poUce on 8.3.1983. This was handed over to hei-in Court and produced marked G with its translation G1. What I have given above is a resume' of the peititoner's account of the incident.

On 20.05.83 the petitioner filed the affidavit dated 19.05.83 of Mrs. Ouida Kuneman. Strong objection was taken to the admission of this affidavit. Learned Senior Counsel for the petitioner submitted that this affidavit was prepared by way of response to what was alleged in the affidavits filed by the respondents. It could not be filed with the counter affidavit of the petitioner because Mrs. Keuneman was campaigning in the recent by-elections and could not be contacted for the preparation of an affidavit before the elections. This affidavit would not ordinarily have been admitted as it was belated. Yet ye admitted it because we felt that the excuse given sufficiently explained the delay. This affidavit was marked F. The learned Additional Solicitor-General then moved to mark Mrs Keuneman's statement to the Police made on the day of the incident. This was not objected to and we allowed the application. This statement was marked 2 R3.

The version placed before this Court on behalf of the respondents is as follows: About 10.15 a.m. of the day of the incident, that is, 8.3.83, Sub-Inspector Ganeshanantham saw a crowd of over fifty persons carrying banners and shouting slogans, and walking along Galle Road from the direction of Galle Face Junction towards Kollupitiya Junction. He went up with four constables to the lady at the head of the procession and asked her whether "they had a permit to go in a procession" but neither she nor any other member of the procession produced a

permit. On thus becoming aware that the procession was being conducted "without the authority of a lawful permit" and that the participants were committing offences under section 77 of the Police Ordinance, in performance of his duty to prevent the conduct of the procession he directed the members of the procession to discontinue the procession and disperse. The petitioner however pushed him aside and proceeded with the procession and thereby obstructed him in the performance of his lawful duty. With the assistance of the other four constables he arrested the petitioner and four other persons and took charge of the banners of the processionists. At the time when he arrested the five persons he informed them of the reason for their arrest. The reason itself is not divulged in any of the affidavits filed by the respondents but during the argument we were informed that it was obstruction of a police officer while in the execution of his duty for which section 32(1)(f) of the Code of Criminal Procedure Act, No. 15 of 1979 authorises arrest without a warrant. It is only fair to add that this reason is adumbrated in the affidavit of Sub-Inspector Ganeshanatham. The Sub-Inspector produced the five arrested persons at the Police Station and made his entries in the Routine Information Book at 10.45 a.m.

The 1st respondent who had come to the Police Station on hearing that a procession of women was marching from Galle Face towards Kottuwapitiya Junction in a protest demonstration, found that the petitioner and three other ladies and one Saranapala Pamunuwa had been arrested by Sub-Inspector Ganeshanathan for failing to disperse when ordered to do so and were being detained in the Crime Detection Bureau of the Station. The petitioner then tried to walk out of the Police Station. Sub-Inspector Ganeshanathan tried to restrain her but she pushed him aside. Constable Thaveendiradas also went up to prevent the petitioner from going away but she slapped him. At this stage the 1st respondent intervened and held her firmly by her hand. She struggled to free herself and in doing so slipped and fell. When she got up a woman constable Ratnaseeli Perera detained the petitioner in the Crime Detection Bureau of the Police Station on the directions of the 1st respondent. Later she was released on bail on Mr Bernard Soysa signing as surety. •

Along with his affidavit the 1st respondent has filed the affidavit (IR1) of Police Constable Thaveendiradas. The 2nd respondent has filed the affidavits of Sub-Inspector Ganeshanathan (2R1) and Reserve Woman Police Constable Ratnaseeli Perera

(2R2) along with his own affidavit. The 1st respondent has also filed a typewritten document in two pages marked X which is subscribed with a signature similar to that of the petitioner. On the top of the first page of the letter there is some handwritten matter making reference to a letter dated 18th March from the '• Secretary to H.E.President." Just before the typewritten matter begins are written the words "Statement of Mrs V. Goonewardene". The typewritten matter in document X purports to be an account of the incident by the petitioner. In her counter affidavit however she does not make herself clear as to whether the typewritten matter in document X is a statement of hers or whether she admits or denies her signature on it. The 1st respondent has stated in his affidavit that this document was received at his Police Station by post.

It will be seen that we have before us two widely different versions of the incident. The main questions of fact on which there is controversy are:

1. Was the petitioner arrested by the 1st respondent inside the KoUupitiya Police Station or was she arrested (along with four others) by Sub-Inspector Ganeshanathan when she and the others arrested were walking along Galle Road towards the KoUupitiya Junction in a procession of several persons carrying banners and shouting slogans?
2. Did the petitioner push Sub-Inspector Ganeshanathan and slap Constable Thaveendiradas when they tried to restrain her from walking away from the Police Station and did the 1st respondent then merely hold her firmly by her hand to prevent her from going away whereat she struggled to free herself and slipped and fell or did the 1st respondent throw her down and kick her and place his foot on her when she lay fallen? ^

Before I deal with the facts a word about the burden of proof. There can be no doubt that the burden is on the petitioner to establish the facts on which she invites the Court to grant her the relief she seeks. This leads to the next question. What is the standard of proof expected of her? Wanasundera J. considered the question in the *case of Velinturugu v. The Attorney-General and another- S.C.* Application no. 74/81 -'S.C. Minute of 9.11.81 - and held that the standard of proof that is required in cases filed under Article 126 of the Constitution for infringement of fundamental rights is proof by a preponderance of proba-

bilities as in a civil case and not proof beyond reasonable doubt. I agree with Wanasundera J. that the standard of proof should be a preponderance of probabilities as in a civil case. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This Court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would. The conscience of the Court must be satisfied that there has been an infringement.

The Court has to be satisfied firstly that there has been an infringement of fundamental rights and secondly that such infringement has been by executive or administrative action.

The infringement complained of in this case falls under two heads:

1. Degrading treatment of the petitioner in contravention of Article 11 of the Constitution;
2. Arrest of the petitioner contrary to procedure established by law and without informing her of the reasons in contravention of Article 13(1) of the Constitution.

### **Degrading treatment**

The 1st respondent is accused of throwing the petitioner down and kicking her and placing his foot on her leg when she lay fallen. Apart from the affidavit of the petitioner herself and her own statement to the Police we have the following material on this point:—

1. Affidavit of Mrs Ouida Keuneman where she says she saw the 1st respondent throw down the petitioner. In the meantime she herself was pushed about and she saw the petitioner lying on the floor. When she went to help the petitioner she saw the first respondent's boot on the petitioner's body.
2. Statement of Ntrs Ouida Keuneman to the PoUce. Here she says the Police Officers pushed the petitioner and she fell down. When she fell she was kicked. She does not single out the 1st respondent as being the perpetrator of any of these acts.
- 3 .No specific allegation of kicking or degrading treatment\* by

the 1st respondent has been made by the petitioner's lawyer in the three letters. B,C,D written obviously on petitioner's instructions on 18.3.83.

4. An affidavit of the press photographer whose arrest, according to the petitioner, sparked off this incident has not been filed. Needless to say his testimony would have been very valuable yet it has not been made available.

5. The 1st respondent and the other Police Officers who have filed affidavits have of course denied the allegations. The Police Officers for their part accuse the petitioner of having pushed Sub-Inspector Ganeshanatham and slapped Constable Thaveendiradas. Further, there is a statement in the letter X that the petitioner twisted the arm of a Policeman.

In this state of the evidence I regret I am unable to hold that the allegation of degrading treatment has been established by proof to the high degree of probability required.

#### **Illegal arrest**

The material relied on for the allegation that the 1st respondent arrested the petitioner is her statement that when she pleaded for the release of the press photographer at the Police Station the 1st respondent's response was: "Shut up; you are under arrest." The petitioner asserted that she had come into the Police Station voluntarily to secure the release of the press photographer but this was not heeded. There are also the affidavit and statement to the Police of Mrs Ouida Keuneman to support the petitioner. But the words "you are under arrest" are of ambiguous import. They could mean "you have already been arrested" just as much as "I am now placing you under arrest."

The version of the respondents is that the arrest took place on the Galle Road before the 1st respondent came to the Police Station. The question of who arrested and where is bound up with the question whether there was a procession being conducted by the petitioner and the other ladies along Galle Road. On this we have conflicting testimony. In the letter X the return trip of the petitioner and the others with her is described as a march and again as a procession. There is also reference to banners. Here too the failure of the petitioner to place before the Court an affidavit of the press photographer must be regarded as a serious shortcoming.

The rival versions on the question whether there was a procession have their infirmities. The burden of proof however is on the petitioner. In the result it cannot be said that the petitioner has

affirmatively proved in the manner required that she was first arrested by the 1st respondent inside the Police Station.

But here the petitioner has two strings to her bow. If it is not accepted that it was the 1st respondent who arrested her there is the admission by Sub-Inspector Ganeshanathan that he arrested her and four others as they were coming along Galle Road in a procession about 50 strong carrying banners and shouting slogans. The petitioner can rely on Sub-Inspector Ganeshanathan's claim to have arrested her to prove her case. Sub-Inspector Ganeshanathan has stated that he questioned the leader of the procession and asked her whether they had a permit. No permit was produced. He then directed the processionists to disperse but they attempted to continue in defiance of his orders. Hence he arrested the petitioner and the other leaders of the procession and the press photographer and took them to the Police Station. He has averred in his affidavit that he gave the reason for the arrest to the arrestees at the time he arrested them. He has however not disclosed in his affidavit what the reason was which he gave.

Let it be borne in mind that it is important that the reason given should be stated to Court. No doubt failure to mention what the reason was to Court would not necessarily mean that no reason was given at the time of arrest. But it is necessary that the Court should have the reason given for the arrest before it, because the legality of the reason can be, as it is here, a live issue in the case. The omission to mention the reason given at the time of arrest is no doubt a grave lapse. Be that as it may. Counsel for the respondents have given us the reason which Sub-Inspector Ganeshanathan gave the arrestees - obstructing him while in the execution of his duties. I will proceed on the footing that the reason for the arrest was given. But was the arrest according to procedure established by law?

The petitioner and her companions are alleged to have conducted a procession "without the authority of a lawful permit" and thereby contravened section 77 of the PoUce Ordinance. Section 77(1) forbids any procession being taken out or held in any public place in any urban area unless notice of the procession has, at least six hours before the time of its commencement, being given to the Officer-in-Charge of the Police Station nearest to the place at which the procession is to commence. Under sub-sections 2 and 5 of this section every person who in contravention of section 77(1) organises a procession or does any act in furtherance of the organisation or assembling of a procession, commits an offence puni-

shable by a fine not exceeding five hundred rupees or imprisonment of either description for a term not exceeding six months or both such fine and imprisonment. Contravention of the provisions of Section 77(1) of the Police Ordinance is a non-cognisable offence for which arrest without a warrant is not permissible — see First Schedule of the Code of Criminal Procedure Act No. 15 of 1979 at page 241. Section 77(1) of the Police Ordinance does not make it an offence to take out or hold a procession on a public road in an urban area without a valid permit. No permit or even permission is required but only notice has to be given. The Ordinance does not even prescribe written notice. It can be oral. Once notice is given or even otherwise it would no doubt be lawful under section 77(3) for an officer of police of a rank not below the grade of Assistant Superintendent, if he considers it expedient so to do in the interests of the preservation of public order, to give directions (whether orally or in writing) prohibiting the taking out of any procession, or imposing on the person or persons organising or taking part in the procession such conditions as appear to him to be necessary, including conditions prohibiting or restricting the display of flags, banners or emblems. But so far as the organisers of the procession are concerned the only legal requirement is to give notice and comply with the directions, if any, of an officer of police of a rank not below the grade of Assistant Superintendent.

It was submitted that during this period the Police Stations in this area were placed in a state of alert owing to the possibility of disturbances and Sub-Inspector Ganeshanathan would have been aware that no notice had been given of this procession to the Officer-in-Charge of the Kottuwapitiya Police Station to which he was attached. But here we are in the field of surmise. Sub-Inspector Ganeshanathan himself says nothing of no notice having been given in his affidavit. It is obvious that he was acting on the footing that without a valid permit no procession is permissible. It must be emphasised that there was no state of emergency on the 8th March, 1983.

Accordingly, there was no legal basis for Sub-Inspector Ganeshanathan's order to the processionists to disperse. The absence of a permit did not make the continuance of the procession an offence or any of the processionists liable to arrest. The petitioner and the others who were with her were well within their rights to ignore the order of Sub-Inspector Ganeshanathan to disperse. I might add that under Article 14(1)(b) of the Constitution the freedom of assembly is a fundamental right guaranteed to all citizens.

As his order to disperse was in the circumstances illegal Sub-Inspector Ganeshanathan is in no position to complain that the petitioner obstructed him while in the execution of his duty. Therefore, he is in no position to justify arresting the petitioner without a warrant by invoking the provisions of section 32(1)(f) of the Code of Criminal Procedure Act, No. 15 of 1979.

On his own showing Sub-Inspector Ganeshanathan was guilty of arresting the petitioner in contravention of the Constitutional prohibition of arrest except according to procedure established by law. The arrest constituted an infringement of a fundamental right. Sub-Inspector Ganeshanathan's action no doubt proceeded from a wrong appreciation of the law, but the infringement remains.

**Executive or administrative action.**

I will now turn to a question on which we heard much argument from both sides. Was the infringement by executive or administrative action?

Learned Senior Counsel for the 1st respondent with support from the Learned Additional Solicitor-General submitted that liability on the basis of executive or administrative action can be established only if the State has either expressly or impliedly authorised or ratified or adopted or condoned or acquiesced in the acts constituting the infringement. The 2nd respondent has expressly sworn to the fact that he has not and will not authorise or condone any illegal acts on the part of his officers. In his affidavit he states he has read the affidavit of Sub-Inspector Ganeshanathan and being satisfied with the truth of the averments therein he is producing it to Court marked 2R1; It is a reasonable inference that the 2nd respondent is adopting the action taken by Sub-Inspector Ganeshanathan which no doubt was felt at that time to be within the pale of the law. Hence the infringement under discussion passes even the test formulated by learned Senior Counsel for the 1st respondent. I have no difficulty in holding that the infringement was by executive action for which the State is liable. This should have been sufficient to dispose of this case but in view of the fact that the question was argued at length before us, I will proceed to deal with it.

The remedy prescribed by Article 126 of the Constitution is available only where there is an infringement or imminent infringement of a fundamental right by executive or administrative action. The question is whether an act violating fundamental rights committed under colour of office by a public officer constitutes

executive or administrative action unless it is expressly or impliedly authorised or adopted or condoned or acquiesced in by the State.

On behalf of the respondents it is argued that constitutional safeguards are directed against the State and its organs and not against individuals. Hence fundamental rights guaranteed against state action cannot be infringed by the conduct of public officials not impliedly or expressly authorised by the State. To make the State liable for the acts of its officials which it has not authorised expressly or impliedly would be to widen State liability to almost uncontrollable proportions.

The principle of liability however must not be determined on the basis of the extensiveness or narrowness of its field of operation. Chapter 3 on Fundamental Rights in our Constitution is concerned with public law. The protection afforded is against contravention of these rights by executive or administrative action of the State and its organs. Public authorities clothed by law with executive and administrative powers are organs of the State. A police officer using the coercive powers vested in him by law acts as an organ of the State. As much as the State is served when he enforces the law, the State is liable for the transgressions of fundamental rights he commits when he is enforcing the law.

Fundamental rights were secured and guaranteed even by the 1972 Constitution but no special machinery, for enforcement was provided. The Constitution of 1978 spells out in detail the Fundamental Rights it recognizes and it has provided a special forum and special machinery for enforcement and for the grant of relief and redress. But the old forms of procedure and the old remedies still co-exist with the new.

The question we are considering has been the subject of judicial decisions in our Courts. Sharvananda J. explained the principles on which liability for infringement of Fundamental Rights is imputed to the State in the *Velmurugu* case (*supra*) as follows:—

"If the State invests one of its officers or agencies with power which is capable of inflicting the deprivation complained of, it is bound by the exercise of such power even in abuse thereof; the official position makes the abuse effective to achieve the flouting of the subject's fundamental rights. The State had endowed the officer with coercive power, and his exercise of its power, whether in conformity with or in disregard of fundamental rights, constitutes 'executive action'. The officer's act is ascribed to the State for the purpose of determining responsibility, otherwise the Constitutional prohibition would have no meaning."

The nature of the liability has been neatly explained by Lord Diplock in the Privy Council decision in *Maharaj V; The Attorney-General of Trinidad and Tobago* (No. 2) - (1979) AC 385, 399 - in the following words :-

"This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, . . . which has been newly created . . ."

Lord Hailsham of St. Marylebone in his minority dissenting judgment in this case did not agree with this formulation because he found "it difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict." His Lordships found it equally difficult to understand that this was "some sort of primary liability". But what Lord Diplock was emphasising was that this was a new liability in public law created by the Constitution of Trinidad and Tobago, not to be considered from the angle of the existing bases of liability. In Sri Lanka too our Constitution has created a new liability in public law.

On the nature of police duties Lord Diplock again made an authoritative pronouncement in the case of *Thorhill v. Attorney-General of Trinidad and Tobago* - (1980) 2 WLR 510, 519 - ,

"It is beyond question, however, that a police officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and the bringing of them before a judicial authority is acting as a public officer carrying out an essential executive function of any sovereign state — the maintenance of law and order or, to use the expression; originally used in England, 'preserving the King's peace'."

Lord Diplock went on to point out that police officers are endowed with coercive powers to perform their functions. This is so in Sri Lanka too. Hence contraventions by the police of any of the Fundamental Rights guaranteed by the Constitution must attract State liability.

The State no doubt cannot be made liable for such infringements as may be committed in the course of the personal pursuits of a public officer or to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State. ^

Reliance was placed by learned Senior Counsel for the 1st respondent on the judgment of Wanasundera J. in the *Velmurugu* case (*supra*). In that case the majority view was that on the facts there was no infringement of fundamental rights. Hence the decision so far as it relates to the interpretation of executive or administrative action must be regarded as correct. Wanasundera J., took the view that the State should be strictly liable for the acts of its high officials. Of subordinate officials he says as follows: -

"The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e., within scope of their authority, express or implied, and should also extend to such other acts that may be *ultra vires* and even in disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State."

This passage appears indeed to support what the petitioner is contending for. With great respect, I do not agree that any distinction should be drawn on the basis of the rank of the official. I can find very little in this judgment which supports the proposition which learned Senior Counsel for the respondents have invited us to accept.

The principle that the State is liable for infringement of fundamental rights committed under colour of office by its public officers was applied by Sharvarianda J. in the case of *Martyadasa Raj V. Attorney General and another* — S.C. Application No. 130/82 — S.C. Minutes of 14.2.83. He explained the principle of liability as follows:-

"What the petitioner is complaining of is an infringement of his fundamental right by 'executive or administrative action' that the State has through the instrumentality of an overzealous or despotic official committed the transgression of his constitutional right. The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment."

With this formulation I respectfully agree. In the instant case the action taken by Sub-Inspector Ganeshanathan was executive action whether the State adopted it or not.

Accordingly I hold that the arrest of the petitioner was unlawful and contravened Article 13(1) of the Constitution. The State is liable for the infringement. Therefore I order the State to pay Rs. 2500/- as compensation to the petitioner. As this award is based on material placed before Court by the Police Officers, I order no costs.

Before I part with this judgment I would like to advert to one last matter which has caused my brothers and me some concern. As there was a sharp conflict of testimony on the question of cruel, inhuman and degrading treatment we may have examined the question of permitting cross-examination on the affidavits. However such a course was not in any event feasible as under Article 126(3) of the Constitution we are obliged to deliver our order today. In the circumstances we direct the 2nd respondent to proceed with his inquiries and take appropriate action in accordance with the law in respect of the various allegations made against the 1st respondent.

**RATWATTE, J.** - I agree

**COLIN - THOME, J.** - I agree.